(4)

No. 09-820

In The

Supreme Court of the United States

MARY D. SHARP,

Petitioner,

vs.

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, and THE LUMMI NATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF LUMMI NATION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Does an upland owner commit a trespass when she refuses a request by the owner of the tidelands to remove rock rip rap that is located on the tidelands?

2. Under the "common enemy" doctrine, can an upland owner deprive a tideland owner of its vested right to the benefits of an ambulatory tidal boundary by placing rock rip rap to permanently "fix" the location of the tidal boundary?

3. Does *stare decisis* militate against revisiting the issue of tidelands ownership on the Lummi Reservation, when three prior cases in the Ninth Circuit have held that the State of Washington does not own the tidelands, and the State declined to assert ownership in this proceeding?

4. Was an Executive Order, signed by President Grant and authorized by Congress when it ratified the Treaty of Point Elliott, sufficient to reserve title to tidelands on the Lummi Reservation to the United States in trust for the Lummi Nation?

5. Is it a violation of Section 10 of the RHA for an upland owner to refuse to remove shore defense structures that were originally erected on the uplands, but are now located seaward of the mean high water mark due to movement of the boundary between upland and tideland?

6. Did the District Court abuse its discretion in issuing an injunction under the RHA?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioner has correctly identified the parties to the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Lummi Nation is a federally recognized Tribe of American Indians. It has no parent companies, subsidiaries or affiliates that have issued shares to the public.

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JURISDICTION

Petitioner correctly states the basis for this Court's jurisdiction.

TREATY, EXECUTIVE ORDER & STATUTORY PROVISIONS AT ISSUE

This case involves interpretation of the Treaty of Point Elliott, an 1873 Executive Order issued by President Grant, Section 4 of Washington's statehood act, and the Rivers and Harbors Act, 33 U.S.C. §401 *et seq*. The Treaty is set out verbatim in this Brief starting at page App-1. The Executive Order is set out verbatim in this Brief starting at page App-14. The text of the relevant provisions of the Rivers and Harbors Act are set out in Petitioner's Brief starting at App-109.

The relevant part of Section 4 of Washington's statehood act provides:

> *Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled*, That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.
>
> . . . .

> *Sec. 4.* . . . That the people inhabiting said proposed States to agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian Tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . .

Washington et al. Statehood Act, Act of Feb. 22, 1889, c. 180, Sec. 4, 25 Stat. 676.

ERRORS IN PETITION FOR CERTIORARI

In accordance with Supreme Court Rule 15(2.), Lummi notes the following misstatements made by Petitioner in her Petition:

1. Petitioner asserts that Lummi is claiming "an unrecognized right to perpetual erosion". *Cert. Petition at 17.* That statement is both incorrect and misleading. Lummi does not claim a "right to erosion". Lummi claims that an adjoining uplands owner cannot unilaterally alter an inherent aspect of Lummi's title: the natural right to an ambulatory boundary.

2. Petitioner states:

> [W]hen an upland owner's property increases through the deposit of alluvion (or reliction), it is not at the expense of the tideland owner. The tidelands simply move (in this case, to the west) from their former location.

Cert. Petition at 17-18. This statement is both misleading and factually incorrect. Offshore currents and other erosive forces may prevent the seaward boundary of the tidelands from moving offshore when the upland accretes. This can cause the area of the tidelands to be diminished on both the landward and the seaward sides when the upland accretes. Moreover, structures such as Petitioner's bulkhead and rock rip rap change the natural dynamics of the beach in many ways that are harmful to the tidelands. Bulkheads and other shore-armoring devices can degrade nearshore habitats that provide food for fish, including salmon. Spawning areas for certain species of fish may be lost due to removal of fine sediments from the intertidal zone. *Lummi App-50 to 53*; *Lummi App-56 to 59*. Shore defense structures can also reduce the amount of shoreline area available for use by fish, shellfish, marine mammals and other marine life, and change the slope of the beach due to the "scouring" effect of bulkheads. *Id.* When the slope of the beach increases, the area of the tidelands is reduced, because tidelands are measured by the intersection of tidal elevations with the slope of the beach. *Id.* The District Court specifically found

that Lummi was losing tidelands as a result of the homeowners' shore defense structures:

> Here, Defendants' shore defense structures do not result in merely incidental injury. Rather, these structures deny the United States and the Lummi Nation land that would otherwise accrue to them through erosion.

Petitioner's App-68.

3. Petitioner states that her bulkhead and rip rap were originally erected on her own land, not in the tidelands. *See, e.g., Cert. Petition at 2, 6.* Although this possibly is true as to the wooden bulkhead, there was conflicting evidence below as to whether Petitioner's rip rap originally was placed above or below the mean high water mark. The District Court did not resolve this question, but simply assumed for purposes of decision that all of Petitioner's structures were originally placed above the mean high water mark, and that erosion of the beach in the area of the rip rap had resulted in some of the rocks being located below mean high water. *Petitioner's App-65.*

4. Petitioner states that mean high water "intersects Homeowners' riprap during some periods and not during others". *Cert. Petition at 6.* Lummi has not been able to find any evidence in the record below that supports this statement. The only evidence in the record on the location of the Petitioner's riprap in relation to mean high water is a 2002 survey submitted by Plaintiffs, which shows that a

portion of Petitioner's rip rap is seaward of mean high water. *ER 231 at page 8.*

5. Petitioner asserts that she was not a member of the Sandy Point homeowner's association that executed the tidelands lease. *Cert. Petition at page 10 n. 4.* Lummi has not been able to find any evidence in the record below to support this statement. Moreover, Petitioner's statement is misleading. Petitioner does not, and cannot, dispute that the tidelands adjacent to her home were included in the 1963 tidelands lease, *Lummi App-29 to 37*,[1] and she admits that she and her predecessor in title erected a seawall and placed rip rap on the beach both during the term of the Lease, and after it expired. *Cert. Petition at 5-6.* Whether Petitioner was a member of the Sandy Point homeowner's association is irrelevant.

6. Petitioner claims that the Court of Appeals "criticize[d] the Homeowners for failing to reach a settlement with the Lummi Nation", and asserts that this criticism was "outrageous". *Cert. Petition at 10.* However, the statements to which Petitioner refers were not critical of Petitioner. At Petitioner's App-28, the Court of Appeals merely pointed out that its ruling on the trespass claim did not necessarily require removal of the shore defense structures, since the Homeowners still had the option of entering into a

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[1] The lease covers tidelands adjacent to Government Lot 1, Section 17, in which Petitioner's vacation home is located. *Lummi App-34.*

new lease with Lummi, and Lummi was willing to accommodate them. At Petitioner's App-44, the Court of Appeals pointed out that it had no choice but to rule on the merits since the parties were unable to reach an agreement. There is nothing outrageous about either of these statements.

STATEMENT OF THE CASE

This case presents no issues meriting review by this Court. The courts below applied well-settled rules governing littoral boundaries and ownership of lands reserved to Indian Tribes to a set of unique facts involving a small Indian Reservation on the coast of Washington state. Petitioner is simply unhappy with a result the law requires her to accept.

A. Overview.

Petitioner is the owner of a waterfront vacation home within the Sandy Point development, located on the Lummi Reservation near Bellingham, Washington. In 1963, a homeowners association leased the tidelands surrounding Sandy Point from the Lummi Nation ("Lummi"). The lease included the tidelands adjacent to Petitioner's vacation home. As required by federal law (25 U.S.C. §415), the lease had a maximum term of 25 years, but the homeowners association was granted an option to renew for an additional 25 years. The lease specifically authorized upland landowners to fill tidelands and erect

bulkheads on the beach to protect their property. The lease also required the landowners to remove those structures if the lease should ever expire without renewal.

During the term of the lease many Sandy Point homeowners erected bulkheads or seawalls and placed large rocks on the beach. Petitioner's predecessor in title erected a wooden bulkhead in 1977. Petitioner purchased her home in 1980. She added rock rip rap seaward of the bulkhead in 1982 and again in 1993. Rip rap consists of irregularly shaped rocks of varying size that are placed in an array in front of a structure or shore bank. Seawater that would otherwise strike the structure or bank first encounters the jumble of rock, which dissipates some of the force of the water by breaking up the waves and allowing the water to flow into the spaces among the rocks.

Over the years, the Sandy Point shoreline has eroded, in part because the structures erected by the Sandy Point owners themselves tend to create a "scouring" action that carries sand away from the beach. It is uncontested that Petitioner's rip rap was, no later than 2002, seaward of the mean high water mark and therefore within Lummi's tidelands.

The tidelands lease expired in 1988, and Lummi's repeated offers to renew it were rejected. In March 1988, the Lummi Nation sent a letter to the Homeowners, informing them (1) that the lease was expiring, and (2) that if they elected not to exercise the

option to renew the lease, any encroaching shore defense structures would have to be removed. Years of fruitless discussion followed, during which time Petitioner reinforced her rip rap by adding additional rock. *Cert. Petition at 6.* In January 2001, the United States sent a letter informing Homeowners that they would be sued if they did not remove their rip rap. When they refused, the United States filed suit in the District Court for the western district of Washington, alleging, *inter alia,* a trespass claim and a violation of the RHA. Lummi intervened as a Plaintiff, to protect its interests in the tidelands.

B. Rulings Below on the Trespass Claim.

Both the District Court and the Court of Appeals ruled in favor of Lummi and the United States on the trespass claim. The Court of Appeals began its analysis by reaffirming that the tidelands adjacent to the Lummi Reservation were reserved to the United States in trust for Lummi:

> Prior quiet title actions make clear that President Grant's executive order was sufficient to prevent ownership from passing to Washington. In ***United States v. Romaine***, the United States sought to quiet title against individuals who had bought Lummi tidelands from the state of Washington. 255 F. 253, 253 (9th Cir. 1919). This court held the president's executive order to be decisive and rejected an argument that the reservation extended only to the high-water mark.

> *Id.* at 259-60. ***Romaine*** noted that when Washington was admitted as a state, it disclaimed any right and title
>
> > to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Id. at 260 (quoting Act of Feb. 22, 1889, ch. 180, §4, 25 Stat. 676, 677). ***United States v. Milner***, 583 F.3d 1174, 1184 (9th Cir. 2009). The Court of Appeals went on to discuss ***United States v. Stotts***, 49 F.2d 619 (W.D.Wa. 1930), which quieted title to the Lummi tidelands in the United States, and ***United States v. Washington***, 969 F.2d 752, 755-56 (9th Cir. 1992), where the "the state [of Washington] took the position that the Lummi reservation extends to the low-tide line and did not claim the tidelands." ***Milner***, 583 F.3d at 1184. After noting that the state of Washington had expressly declined to claim ownership of the tidelands and intervene in the present case, the Court of Appeals pointed out that *stare decisis* "applies with special force to decisions affecting title to land" and concluded that there was "no reason . . . to overturn 90 years of precedent, especially when the supposed title holder has declined to claim ownership". *Id.* at 1185. The Court of Appeals rejected Petitioner's

argument that the State of Washington acquired ownership of the tidelands at statehood under the "equal footing" doctrine. *Id.* at 1185-86.

After confirming title in the United States, the courts below applied the well-settled rule that the boundary between upland and tideland is ambulatory, moving as the shoreline accretes and erodes. 583 F.3d at 1187. The Court of Appeals pointed out that the right to an ambulatory boundary is a vested property right:

> [B]oth the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains that accrue from the movement of the boundary line. The relationship between the tideland and upland owners is reciprocal: any loss experienced by one is a gain made by the other, and it would be inherently unfair to the tideland owner to privilege the forces of accretion over those of erosion. Indeed, the fairness rationale underlying courts' adoption of the rule of accretion assumes that uplands already are subject to erosion for which the owner otherwise has no remedy.

Id. at 1188.

The Court of Appeals specifically followed the rule set out in ***County of St. Clair v. Lovingston***, 90 U.S. 46, 68-69 (1874):

> The riparian right to future alluvion is a vested right. It is an inherent and essential

> attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim '*qui sentit onus debet sentire commodum*' lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property.

It is this inherent and essential attribute that Petitioner now asks this Court to change.

The courts below rejected Petitioner's argument that she had somehow "fixed" the ambulatory boundary when she erected her shore defense structures:

> The Homeowners have the right to build on their property and to erect structures to defend against erosion and storm damage, but all property owners are subject to limitations in how they use their property. The Homeowners cannot use their land in a way that would harm the Lummi's interest in the neighboring tidelands. Given that the Lummi have a vested right to the ambulatory boundary and to the tidelands they would gain if the boundary were allowed to ambulate, the Homeowners do not have the right to permanently fix the property boundary absent consent from the United States or the Lummi Nation. The Lummi similarly could not erect structures on the tidelands that would permanently fix the boundary

> and prevent accretion benefitting the Homeowners.

Id. at 1189-90. The Court of Appeals also rejected the argument that the "common enemy" doctrine allows an upland owner to "fix" the boundary. 583 F.3d at 1188-89.

Based on the foregoing, the courts below concluded that Petitioner's rock rip rap was encroaching on Lummi's tidelands, 583 F.3d at 1191, and would have to be removed unless Petitioner entered into a new agreement with Lummi.

C. Rulings Below on the Rivers and Harbors Act Claim.

The courts below held that Petitioner had violated the Rivers and Harbors Act by failing to remove her rip rap from the navigable waters of the United States. 583 F.3d at 1191-94. Lummi was not involved in this claim.

D. Petitioner's Appeal.

All of the Homeowner-Defendants except Petitioner have either executed, or are in the process of negotiating, new tideland use agreements with the Lummi Nation. Petitioner alone seeks review by the Supreme Court of the rulings on both the trespass and RHA claims.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. The Trespass Claim.

One hundred and twenty years ago, this Court held:

> Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary; and a deed describing the lot by number or name conveys the land up to such shifting water line, exactly as it does up to the fixed side lines; so that, as long as the doctrine of accretion applies, the water line, no matter how much it may shift, if named as the boundary, continues to be the boundary, and a deed of the lot carries all the land up to the water line.

Jefferis v. East Omaha Land Co., 134 U.S. 178, 188 (1890). The Court of Appeals faithfully followed this principle:

> Under the common law, the boundary between the tidelands and the uplands is ambulatory; that is, it changes when the water body shifts course or changes in volume. *See* ***Jefferis v. East Omaha Land Co.***, 134 U.S. 178, 189, 10 S.Ct. 518, 33 L.Ed. 872 (1890); ***California ex rel. State Lands Comm'n v. United States***, 805 F.2d 857, 864 (9th Cir. 1986); ***United States v. Boynton***, 53 F.2d 297, 298 (9th Cir. 1931). The uplands owner loses title in favor of the tideland owner – often the state – when land is lost to the sea by erosion or submergence. The

> converse of this proposition is that the littoral property owner gains when land is gradually added through accretion, the accumulation of deposits, or reliction, the exposure of previously submerged land. *See* ***County of St. Clair [v. Lovingston]***, 90 U.S. at 68-69, 23 Wall. 46; ***Jefferis***, 134 U.S. at 189, 10 S.Ct. 518; 65 C.J.S. Navigable Waters § 95 (2009). These rules date back to Roman times, and have been noted in Blackstone's Commentaries and many other common law authorities and cases.

583 F.3d at 1187.

Petitioner does not cite any authority holding to the contrary, and cannot dispute that this has been the law for at least 120 years. Instead, she asks this Court to overrule this long-standing precedent and create a new rule that an uplands owner can, by erecting shore defense structures, unilaterally deprive the tideland owner of its vested right to the benefits that may accrue from an ambulatory boundary. For a multitude of reasons, this Court should refuse to entertain Petitioner's request.

A. The Court of Appeals decision is very limited in scope and impact.

Contrary to the cries of alarm and doom that fill Ms. Sharp's Petition, the factual context of this case is unique. The case presents a federal question only because it involves tidelands beneficially owned by an Indian tribe within an established Indian

Reservation. That situation is not even typical of Indian Reservations located in western Washington state. *Compare* ***United States v. Aam***, 887 F.2d 190, 196-97 (9th Cir. 1989) (tidelands not included in Suquamish reservation) *and* ***Skokomish Tribe v. France***, 320 F.2d 205, 210 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964) (tidelands not included in Skokomish reservation). To the best of Lummi's knowledge, no comparable facts exist in "the entire City of New Orleans, Boston's Back Bay, major portions of San Francisco, San Jose and Seattle" as Petitioner theorizes. *Cert. Petition at 14.*

Contrary to Petitioner's assertion, *Cert. Petition at 12 n. 6*, where tidelands owned by the State or private persons are involved, state law will determine the incidents and consequences of property ownership, including doctrines such as adverse possession that can be used to stabilize titles where fill and bulkheads have been placed in privately owned tidelands or tidelands owned by the State. *See, e.g.*, ***Borax Consolidated Ltd. v. Los Angeles***, 296 U.S. 10, 22 (1935) ("Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law.") As to land where title is held by or derived from the United States, state law will often be borrowed as the rule of decision:

> Controversies governed by federal law do not inevitably require resort to uniform federal rules. It may be determined as a matter of choice of law that, although federal law should govern a given question, state law

> should be borrowed and applied as the federal rule for deciding the substantive legal issue at hand.

California ex rel. State Lands Comm'n v. United States, 457 U.S. 273, 283 (1982) (citations omitted). Only in the rare case will local law not govern, and the Court of Appeals decision below therefore will necessarily have very limited application elsewhere.

B. The Court would have to overrule more than 120 years of littoral boundary law and *Wilson v. Omaha Indian Tribe* to grant the relief Petitioner seeks.

Petitioner concedes that ***Wilson v. Omaha Indian Tribe***, 442 U.S. 653, 678 (1979), mandates consideration of state law in real property cases on Indian reservations,[2] and that the Washington Supreme Court has expressly rejected the common enemy doctrine where sea water is involved. ***Grundy v. Thurston County***, 155 Wn.2d 1, 10 (2005).[3]

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[2] In ***Wilson***, the Court held that the local law *(there, the law of Nebraska)* of accretion and avulsion should be considered when deciding whether the Omaha Tribe or the State of Nebraska owned certain riparian land on the Omaha Reservation. The Court reasoned that, although the determination of titles to reservation lands is a matter of federal law, "federal law should incorporate the applicable state property law to resolve the dispute", 442 U.S. at 678, unless an overriding federal interest requires use of a uniform federal rule.

[3] In ***Grundy***, the owner of land on the coast increased the height of a seawall, which in turn caused seawater to surge onto

(Continued on following page)

Nonetheless, Petitioner appears to ask this Court to (1) adopt the common enemy doctrine as a matter of federal common law and (2) apply that new rule here. In order to do so, this Court would have to overrule ***Wilson*** and its progeny, as well as the long line of cases holding that the boundary between upland and tideland is ambulatory.

The Court would also have to contort the logic behind the common enemy doctrine. As the Court of Appeals explained, the "common enemy" doctrine does not fit in the context of littoral boundaries:

> On the one hand, the injury complained of is not the diversion of water onto the tidelands; rather, it is the physical encroachment of the shore defense structures themselves. . . . On the other hand, the rule is inapposite because the water is not acting as a "common enemy" of the parties involved. The tide line is an inherent attribute of the properties at issue, since it dictates where the tidelands end and the uplands begin. That the boundary is ambulatory does not make it a common enemy, since any movement seaward or landward is to the benefit of one party and the detriment of the other.

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a neighbor's land. After the neighbor filed a private nuisance action, the owner asserted a "common enemy" defense, claiming a right to deflect sea water by any means. The Washington Supreme Court rejected the defense, and held that the common enemy doctrine did not apply to seawater. 155 Wn.2d at 10.

583 F.3d at 1189. Where erosion and accretion are natural and normal events that affect property boundaries, the action of the water is neither an "enemy" common to both parcels nor the type of extraordinary event to which the doctrine is applicable. Indeed, the ambulatory boundary can been seen as a "friend" to the property owner who receives the accretion.

C. State law was properly adopted here.

Petitioner does not explain why it was error for the Court of Appeals to adopt state law as the rule of decision; she just asks this Court to establish a different federal rule. However, this Court has already rejected the argument that a uniform federal rule is necessary in cases such as this:

> [W]e perceive no need for a uniform national rule to determine whether changes in the course of a river affecting riparian land owned or possessed by the United States or by an Indian tribe have been avulsive or accretive. For this purpose, we see little reason why federal interests should not be treated under the same rules of property that apply to private persons holding property in the same area by virtue of State, rather than federal, law. . . . ***We should not accept "generalized pleas for uniformity as substitutes for concrete evidence that adopting State law would adversely affect [federal interests].***"

Wilson, 442 U.S. at 673 *(emphasis added; citation omitted)*. Petitioner has not identified ***any*** federal interests that might be adversely affected by refusing to apply the "common enemy" doctrine to seawater, nor are there any obvious ones.[4]

D. The "common enemy" rule has been rejected by courts around the country.

Petitioner asserts that the Court of Appeals "announced a startling change in the common law" when it refused to apply the "common enemy" doctrine. *Cert. Petition at 15.* That is not true. As the Court of Appeals pointed out, courts all around the country have rejected the "common enemy" doctrine:

> Many jurisdictions have dispensed with the [common enemy] doctrine altogether and instead apply a rule of reasonableness, under which "each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is unreasonable." *[String citation omitted.]* While Washington has retained the doctrine, it has modified the rule so that property owners

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[4] In ***California ex rel. State Lands Comm'n v. United States***, 457 U.S. 273 (1982), the Court followed ***Wilson***, but concluded that significant federal interests present in that case militated in favor of application of a federal rule that differed from state law. That is not true here.

> must exercise due care by "acting in good faith and avoiding unnecessary damage to the property of others," *[citation omitted]* and by making the rule inapplicable to sea water. *Grundy*, 117 P.3d at 1094. It is far from clear, then, that the common enemy rule, as advocated by Homeowners, is even the dominant view.

583 F.3d at 1189 n. 10.

E. The new rule Petitioner seeks does not fairly balance the equities.

Implicit in Petitioner's request for a new rule of law is the notion that her use of the uplands for a vacation home is more valuable than the uses to which the tidelands may be put. Lummi strongly disagrees, for the reasons stated by the Court of Appeals in its decision below:

> [W]e decline to hold that the use of uplands is inherently more valuable than the use to which tidelands can be put. As was already noted, the tidelands have played an important role in the Lummi's traditional way of life, and in most other areas, the tidelands are held by the state in trust for the public. *See* ***Illinois Central R.R. Co. v. Illinois***, 146 U.S. 387, 436-37, 13 S.Ct. 110, 36 L.Ed. 1018 (1892). These interests are substantial, and the uses they represent are not obviously less productive. *See* ***Shively v. Bowlby***, 152 U.S. 1, 57, 14 S.Ct. 548, 38 L.Ed. 331 (1894) ([Lands under tide waters]

> are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right.)

583 F.3d at 1188. The uplands and tidelands both have value, and the rule applied by the courts below recognizes that important fact. There is no reason to grant review.

F. The facts do not support Petitioner's argument and do not justify granting the Petition.

Petitioner claims that the Court of Appeals "assume[d] that the property line [between upland and tideland] ignores the existing structure and, instead, permeates it and places the boundary as if the structure had never existed." *Cert. Petition at 16.* However, insofar as Petitioner's rip rap is concerned, this was not an assumption, because Petitioner's rip rap does not, in fact, form a solid barrier against the sea. The rocks are irregularly sized and shaped. There are spaces between them. The tide still flows around them, through the spaces between them, and beyond the rocks themselves. Thus, Petitioner's rip rap does not stop the tide and does not arrest the boundary. The boundary between Petitioner's uplands and Lummi's tidelands remains ambulatory as a matter of fact to this day. Thus, even ***if*** there were some merit to the argument that an impermeable barrier to the sea "fixes" the boundary

line, Petitioner would not be entitled to the benefit of such a rule under the facts of this case.

G. Petitioner can maintain her shore defense structures simply by executing a new tidelands agreement.

Petitioner tries to create the impression that she will lose her vacation home to the sea unless certiorari is granted. However, Lummi has always remained ready and willing to enter into a new tidelands agreement with Petitioner, which would permit Petitioner to maintain and improve her shore defense structures as needed. The sea may eventually take Petitioner's vacation home, but only as a result of natural forces and Petitioner's refusal to take a readily available alternative to protect her own interests to the extent possible.

Petitioner claims that she has "always been willing to pay the tideland owner for the fair market value" of the tidelands she is using, but she couples that assertion with her claim that Washington state is the true tideland owner. *Cert. Petition at 11 n. 5.* In any event, that assertion is not supported by the record below, nor was any evidence introduced below as to what constitutes "fair market value" in this case.

Petitioner seems to think that she is entitled to decide what price Lummi should charge for the use of its property. *Cert. Petition at 10-11.* To the contrary, Lummi is free to charge whatever it deems

reasonable, taking into account the benefit Petitioner derives from her use of the tidelands, the consequent loss of use Lummi will suffer, Lummi's reliance on fisheries, and the adverse effect shore defense structures have on fish habitat. Petitioner's suggestion that Lummi is asking a confiscatory amount of rent is rebutted by the fact that other tideland owners have accepted Lummi's terms. Indeed, resolution of this dispute by agreement would likely promote Petitioner's property values.

The decisions of the courts below on the trespass claim do not present any new or novel questions, are consistent with well-settled law, and have limited application elsewhere. In order to give Petitioner the relief she seeks, this Court would have to overrule 120 years of established precedent, and apply a common law rule that is being widely rejected by the courts. There is no reason to grant certiorari as to the trespass claim.

II. Ownership of the Tidelands.

The courts below concluded that the tidelands within the Lummi Reservation are owned by the United States in trust for Lummi, not by the State of Washington under the "equal footing" doctrine. Petitioner asks this Court to grant certiorari because this ruling was contrary to prior decisions of this Court. *Cert. Petition at 33, 35, 36.* This request should be denied, because Petitioner has failed to demonstrate that the Court of Appeals created new law or

that a conflict exists among the circuits. She argues only that the courts below incorrectly concluded that the equal footing doctrine had been satisfied. That is *per se* insufficient to justify review by this Court.

A. The bases for the Court of Appeals decision.

As a preliminary matter, Petitioner claims that there were three bases for the Court of Appeals decision on the ownership issue, *Cert. Petition at 34,* when in fact there were only two. The Court of Appeals held:

1. The ownership issue has been decided in favor of Lummi and the United States in three prior Ninth Circuit cases, and the doctrine of *stare decisis*, which applies with extra force in the case of issues affecting property titles, militates against revisiting that issue at this late date. 583 F.3d at 1183-1185.

2. Even if the ownership issue were revisited, it would be decided the same way under present "equal footing" caselaw. 583 F.3d at 1185-1186.

Petitioner claims that the Court of Appeals also relied on the fact that the State of Washington was not a party to the proceeding. *Cert. Petition at 35.* That is not true. The Court of Appeals expressly ruled in Petitioner's favor on this point, holding that

Petitioner was free to assert that the State owned the tidelands:[5]

> The United States argues that the Homeowners cannot assert Washington state's title in the tidelands because in a trespass action "[t]itle in a third person may not be alleged by a defendant who is not in privity of title with the third person", and the Homeowners do not claim to be in privity with the state. . . . However, this applies where the plaintiff is the one in possession and, in moving for partial summary judgment on the issue of ownership, the United States did not present evidence showing that it or the Lummi Nation was currently in possession of the tidelands.

583 F.3d at 1183 n. 7.

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[5] By noting this holding, Lummi does not concede that the conclusion by the Court of Appeals was correct. The State of Washington is certainly bound by the quiet title decisions in the prior cases. It is difficult to see how Petitioner's ability to litigate the ownership issue could be greater than the entity she claims to be the owner. Nonetheless, the Court of Appeals did allow Petitioner to argue in favor of state ownership even though the state was not a party to the case and had declined to assert ownership in its own right.

B. The Court of Appeals correctly held that the doctrine of *stare decisis* precludes relitigation of the ownership issue here.

The doctrine of *stare decisis,* which precludes relitigation of issues previously decided, applies with special force in proceedings involving title to land:

> Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on a change of the law when the administrators of it change. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants, challenging the justice of their well-considered and solemn judgments.

Minnesota Mining Co. v. National Mining Co., 70 U.S. 332, 334 (1865).

Here, Petitioner admits, as she must, that there are three prior cases expressly holding that the United States owns the Reservation tidelands in trust for Lummi. *Cert. Petition at 34 n. 15.* In ***United States v. Romaine***, 255 F. 253 (9th Cir. 1919), the Court of Appeals rejected the argument that the State of Washington succeeded to title of tidelands on the perimeter of the Lummi Reservation by virtue of the "equal footing" doctrine, and held that the United States holds title in trust for Lummi. Petitioner attempts to distinguish ***Romaine*** on the grounds that different tidelands, which were expressly reserved in the Treaty of Point Elliot, were at issue there. However, the ***Romaine*** court did not reject the equal footing doctrine as a source of state title on the grounds that the specific lands in question were part of the island reserved in the Treaty. It rejected the equal footing doctrine because the Executive Order reserved all the tidelands described therein from the state for an appropriate public purpose (creation of an Indian Reservation). Additionally, it held that Congress approved the reservation when it required Washington to forever disclaim all right and title to "all lands lying within said limits owned or held by any Indian or Indian tribes" when Washington was admitted to the Union. *Act of Feb. 22, 1889, c. 180, Sec. 4, 25 Stat. 676, cited in* ***Romaine***, 255 F. at 260. ***Romaine*** unquestionably resolved the issue Petitioner attempts to raise here.

United States v. Stotts, 49 F.2d 619 (W.D.Wash. 1930), was the second case to hold that the United

States holds title to the Lummi tidelands. Petitioner claims that ***Stotts*** is inapposite because "it is not clear where the tidelands in that case were located or whether they were reserved by the Executive Order alone." *Cert. Petition at 35 n. 15.* However, the evidence below conclusively proved that the lands at issue were located along Sandy Point, in the portion of the Reservation added by the 1873 Executive Order. *Lummi App-15, 20-21.*

In ***United States v. Washington***, 969 F.2d 752, 753 (9th Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993), the State of Washington conceded that it has no claim to the lands above the low water mark. Petitioner attempts to distinguish this case as well, but even Petitioner cannot dispute that the State of Washington made the concession relied upon by the Court of Appeals.[6]

Given (1) that no less than three prior cases[7] have held that the United States, not the State of

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[6] The State also declined an invitation by the Homeowners to intervene in the present proceeding to assert State title to the tidelands.

[7] Only a year after ***Stotts*** was decided, the Court of Appeals issued a decision in yet another quiet title case involving Lummi Reservation tidelands. In ***United States v. Boynton***, 53 F.2d 297 (9th Cir. 1931), the defendant generally conceded tribal ownership of the tidelands, arguing only that the meander line of the upland surveys was a fixed boundary line, which was not affected by subsequent erosion or accretion. The Court of Appeals rejected that contention, as did the courts in the present case.

Washington, owns the tidelands on the Lummi Reservation, and (2) that the State of Washington accepts that ruling and no longer claims ownership of the tidelands, the Court of Appeals correctly applied the doctrine of *stare decisis*. Petitioner now asks this Court to overturn a ruling that has stood for over 90 years, and upon which the United States, the Lummi Nation, and the State of Washington have relied to conduct their affairs, without giving any reason for the Court to do so. *Stare decisis* cannot be so easily ignored:

> Time and time again, this Court has recognized that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *[Citations omitted.]* Adherence to precedent promotes stability, predictability, and respect for judicial authority. . . . [W]e will not depart from the doctrine of *stare decisis* without some compelling justification.

Hilton v. South Carolina Public Railways Comm'n, 502 U.S. 197, 202 (1991). There is no such justification here.

C. The courts below followed *Idaho v. United States* and correctly concluded that the State of Washington did not acquire title to the tidelands at statehood under the "equal footing" doctrine.

Petitioner admits that the Court of Appeals correctly relied on the two-part test from ***Idaho v.***

United States, 533 U.S. 262 (2001), and similar cases, to determine whether the tidelands passed to the State of Washington under the "equal footing" doctrine. *Cert. Petition at 36.* That test is:

> (1) Whether there was an intent to include land under navigable waters *within the federal reservation*, and
>
> (2) If so, whether Congress intended to defeat the future State's *title* to the submerged lands.

533 U.S. at 273 *(emphasis added).*

Petitioner concedes, as she must, that the first part of the test is satisfied: the tidelands were expressly included in the legal description in the Executive Order that created the Lummi Reservation. Petitioner objects only to the rulings on the second part of the ***Idaho*** test. Petitioner's objections are not well-taken.

The Lummi Reservation was created by the Treaty of Point Elliott, *12 Stat. 927.* Congress was aware of the importance of fishing to the Northwest Indians like Lummi, because the Treaty reserved an exclusive right of fishing for the Tribes within the area and boundary waters of their reservations, as well as reserving to the Tribes the right to off-reservation fishing "at all usual and accustomed grounds and stations". ***United States v. Washington***, 384 F. Supp. 312, 332 (W.D. Wa. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). Given the central role of the beaches in tribal

life, the universal dependence of the Lummis on tideland resources, and the fact that many of the allotments authorized by the Treaty would be located away from the beaches, *Lummi App-41 to 47,* Indian ownership and use of the beaches was necessary for the Reservation to be successful. The Treaty set aside all the lands within the Reservation for the Indians' "exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands," *12 Stat. 927 at Art. 2.*

Article 7 of the Treaty provided that the "President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to . . . such other suitable place within said Territory as he may deem fit." *12 Stat. 927 at Art. 7.* Congress approved the discretionary power that Article 7 conferred on the President when it ratified the Treaty in 1859. "When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress." ***Dames & Moore v. Regan***, 453 U.S. 654, 668 (1981).

In 1873, President Grant exercised his delegated power to add the Sandy Point area to the Reservation and to make it plain that the Reservation boundary extended to "the low water mark on the Gulf of Georgia", explicitly encompassing the tidelands at

issue here.[8] *Executive Order, 12 Stat. 928.* If there were no intent to include the tidelands, the description would have run to the high water mark, which is the landward boundary of tidelands. And there was no reason to include tidelands at the edge of the Reservation if there was no intention to reserve those tidelands for the future use of the Indians.

Since President Grant's intent to reserve the Lummi tidelands for the sole benefit of the Indians was "made plain" from the face of the Executive Order, the Executive Order "placed Congress on notice that the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside . . . submerged lands in the Reserve". *See* ***Alaska v. United States (Arctic Coast)***, 521 U.S. 1, 45 (1997). When the State of Washington was admitted to the Union in 1889, Congress required the State, as a condition of statehood, to disclaim any interest in any lands "owned or held by any Indian or Indian Tribe" until the United States had extinguished the Indians' title. *Act of Feb. 22, 1889, c. 180, Sec. 4, 25 Stat. 676.*[9]

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[8] The Executive Order expressly noted that much of the land within the legal description was "a part of the island already set apart by the second article of the treaty". *12 Stat. 928.*

[9] "[The State of Washington shall] forever disclaim all right and title . . . to all lands within said limits owned or held by any Indian or Indian tribe; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said

(Continued on following page)

There would have been no reason for Congress to require the new state to disclaim interests in submerged lands on Indian reservations unless Congress intended to continue President Grant's reservation of those tidelands for the benefit of the Tribes.

Petitioner argues that the Court of Appeals made "a radical departure from this Court's jurisprudence" by relying on allegedly "boilerplate"[10] disclaimer language in Washington's statehood act. *Cert. Petition at 36.* However, as Petitioner admits in a footnote, the ***Idaho*** Court relied in part on a similar "boilerplate" disclaimer to find that the United States, not the State of Idaho, owned submerged lands on the Coeur d'Alene reservation in trust for the Coeur d'Alene Tribe. *Cert. Petition at 37 n. 18.* And in ***Arctic Coast***, the Court considered similarly broad language in a proviso that related to unnamed wildlife refuges: "[provided] [t]hat such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife. . . . " 521 U.S. at 55. Petitioner claims that ***Arctic Coast*** supports her position, but does not explain how this generalized reference to "lands withdrawn or otherwise set apart as wildlife refuges" is any more specific

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Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." *Act of Feb. 22, 1889, c. 180, Sec. 4, 25 Stat. 676.* Parallel language was included in Washington's Constitution, Art. XXVI, as required by the Enabling Act.

[10] Congress included similar disclaimers in several statutes admitting other states to the Union.

than "lands owned or held by Indians or Indian tribes".

But even if prior decisions of this Court had not given effect to "boilerplate" disclaimers, the federal courts are not free to ignore statutory language simply because Congress has used it frequently. The focus of the inquiry should be on whether the meaning of the language is clear and the application of the language to the situation is certain. While there undoubtedly could be situations where it might be difficult to know whether specific lands were in fact "owned or held by an Indian or Indian tribe" at the time of statehood, this is not such a case. ***Idaho*** and ***Arctic Coast*** control here, and there is no need to grant certiorari to address this issue yet again.

III. The Rivers and Harbors Act Claim.

Lummi did not participate in this claim below, and therefore does not respond to the Petition for Certiorari on this claim, except as to the propriety of the injunction issued by the District Court.

A. There is no conflict among the lower courts on the issue of whether the District Court has discretion to issue an injunction under the Rivers and Harbors Act.

Petitioner claims that the Court of Appeals held that an injunction is "automatic" when the RHA has been violated. *Cert. Petition at 31.* That is not true.

The District Court's issuance of the injunction was clearly an exercise of discretion, and the Court of Appeals held that the District Court did not abuse its discretion. 583 F.3d at 1193-94. The District Court issued the injunction only after considering a number of factors, including the nature of the interest to be protected, the degree and kind of wrong, and the practicability of the remedy. *Petitioner's App-60 to 70.*

Petitioner also argues that the District Court should have balanced the equities before issuing the injunction. *Cert. Petition at 31 to 32.* However, none of the cases cited by Petitioner require the courts to do so before issuing an injunction under §406 of the RHA. ***State of South Carolina ex rel. Maybank v. South Carolina Electric & Gas Co.***, 41 F. Supp. 111, 118-19 (E.D.S.C. 1941), held only that the issuance of an injunction under the RHA is discretionary:

> When section 406 provides that the removal of prohibited structures 'may be enforced by the injunction of any district court' . . . , the Congress intended that . . . the district court . . . should exercise discretion in each instance in determining . . . whether an injunction should be granted. The Congress did not intend that it should be mandatory . . . on the district court to grant an injunction in every suit.

In ***United States v. Bailey***, 467 F. Supp. 925 (E.D.Ark. 1979), the district court exercised its discretion to deny injunctive relief based on inequitable conduct by the United States. Neither case mentions

balancing the equities, and ***United States v. Stoeco Homes, Inc.***, 498 F.2d 597, 611 (3rd Cir. 1974), expressly holds that balancing the equities is not required:

> No balancing of interest or need to show irreparable injury is required when an injunction is sought under §12 [of the RHA] to prevent erection or seek removal of an unlawful structure.

There is no conflict for this Court to resolve.

B. Petitioner left the District Court no choice but to grant injunctive relief.

As noted in the preceding paragraph, Congress intended to give the district courts discretion when it came to issuing injunctions under the RHA. Here, the District Court exercised its discretion to grant injunctive relief requiring Petitioner to remove her encroaching shore defense structures. This exercise of discretion was more than reasonable, given Petitioner's inequitable conduct here. Petitioner placed shore defense structures on Lummi's tidelands during the term of the Lease, or near those lands knowing that the location would soon be overtaken by the ambulatory boundary. She then refused to renew the lease on the grounds that her shore defense structures had unilaterally "fixed" the previously ambulatory boundary in her favor. Lummi could have similarly resorted to self-help and removed the rip rap that is sitting on its lands. Instead, it sought a

court resolution of the matter. Given the importance Petitioner places on being able to maintain her shore defense structures in the tidelands, and the loss of use of, and damage to, the tidelands that Lummi suffers from Petitioner's continued use of the tidelands, and Petitioner's refusal to enter into a use agreement with Lummi, there was no other remedial option open to the District Court.

The decision to grant injunctive relief was consistent with existing law and justified by the circumstances. A grant of certiorari would be neither necessary nor appropriate.

CONCLUSION

Petitioner chose to purchase a vacation home that was improvidently located too close to a shoreline that has been eroding for many years. Both she and her predecessor in title took advantage of the 1963 tidelands lease with Lummi to protect that home with shore defense structures. When that lease expired, Petitioner elected not to renew. Instead, she tried to get the benefit of the tidelands for nothing, claiming that shore defense structures built with Lummi's permission had somehow deprived Lummi of its ownership of the tidelands.

While it is certainly true that Petitioner will be better off if she can use Lummi's property free of charge, the courts below correctly concluded that the law does not allow Petitioner to unilaterally deprive

Lummi of its vested property rights in the tidelands. The solution, which has always been available to Petitioner, is to negotiate an agreement with Lummi for the use of its tidelands.

The issues presented here are unique to tidelands held in trust for tribes within established Indian Reservations. The parade of horribles conjured up by Petitioner and by amicus curiae below are fictional. Since this case presents no national issue on which this Court's resolution or guidance is needed, the Petition for Certiorari should be denied.

Dated: January 10, 2010.

Respectfully submitted,

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TREATY WITH THE DWAMISH, SUQUAMISH, ETC., 1855.

Jan. 22, 1855. | 12 Stat. 927. Ratified Mar. 8, 1859. | Proclaimed Apr. 11, 1859.

Indian Affairs: Laws and Treaties. Vol. II (Treaties). Compiled and edited by Charles J. Kappler. Washington: Government Printing Office, 1904.

Articles of agreement and convention made and concluded at Múúcklte-óóh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men and delegates of the Dwáámish, Suquáámish, Sk-táához, Sam-ááhmish, Smalh-kamish, Skope-ááhmish, Stkáá-mish, Snoquáálmoo, Skai-wha-mish, N" Quentlmáá-mish, Sk-táá-le-jum, Stoluck-whá-mish, Shaho-mish, Skáágit, Kik-i-áállus, Swin-áá-mish, Squináá-mish, Sah-ku-méehu, Noo-whá-ha, Nook-wachá-mish, Mee-séée-qua-quilch, Cho-bah-áá-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE 1.

The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in

and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence around the foot of Vashon's Island eastwardly and southeastwardly to the place of begining, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ARTICLE 2.

There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island, called Sháális-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

ARTICLE 3.

There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including

Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. *Provided, however*, That the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE 4.

The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE 5.

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purposes of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however*, That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE 6.

In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner – that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two year, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each years; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may, from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 7.

The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for

their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE 8.

The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 9.

The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the

property taken shall be returned, or in default thereof, of if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 10.

The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 11.

The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE 12.

The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 13.

To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE 14.

The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter"s shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And

the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE 15.

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year herein-before written. Isaac I. Stevens, Governor and Superintendent. [L. S.]

Seattle, Chief of the Dwamish and Suquamish tribes, his x mark. [L. S.]
Pat-ka-nam, Chief of the Snoqualmoo, Snohomish and other tribes, his x mark. [L. S.]
Chow-its-hoot, Chief of the Lummi and other tribes, his x mark. [L. S.]
Goliah, Chief of the Skagits and other allied tribes, his x mark. [L. S.]
Kwallattum, or General Pierce, Sub-chief of the Skagit tribe, his x mark. [L. S.]
S"hootst-hoot, Sub-chief of Snohomish, his x mark. [L. S.]

Snah-talc, or Bonaparte, Sub-chief of Snohomish, his x mark. [L. S.]
Squush-um, or The Smoke, Sub-chief of the Snoqualmoo, his x mark. [L. S.]
See-alla-pa-han, or The Priest, Sub-chief of Sk-tah-le-jum, his x mark. [L. S.]
He-uch-ka-nam, or George Bonaparte, Sub-chief of Snohomish, his x mark. [L. S.]
Tse-nah-talc, or Joseph Bonaparte, Sub-chief of Snohomish, his x mark. [L. S.]
Ns"ski-oos, or Jackson, Sub-chief of Snohomish, his x mark. [L. S.]
Wats-ka-lah-tchie, or John Hobtsthoot, Sub-chief of Snohomish, his x mark. [L. S.]
Smeh-mai-hu, Sub-chief of Skaiwha-mish, his x mark. [L. S.]
Slat-eah-ka-nam, Sub-chief of Snoqualmoo, his x mark. [L. S.]
St"hau-ai, Sub-chief of Snoqualmoo, his x mark. [L. S.]
Lugs-ken, Sub-chief of Skai-wha-mish, his x mark. [L. S.]
S"heht-soolt, or Peter, Sub-chief of Snohomish, his x mark. [L. S.]
Do-queh-oo-satl, Snoqualmoo tribe, his x mark. [L. S.]
John Kanam, Snoqualmoo sub-chief, his x mark. [L. S.]
Klemsh-ka-nam, Snoqualmoo, his x mark. [L. S.]
Ts"huahntl, Dwa-mish sub-chief, his x mark. [L. S.]
Kwuss-ka-nam, or George Snatelum, Sen., Skagit tribe, his x mark. [L. S.]
Hel-mits, or George Snatelum, Skagit sub-chief, his x mark. [L. S.]

S"kwai-kwi, Skagit tribe, sub-chief, his x mark. [L. S.]
Seh-lek-qu, Sub-chief Lummi tribe, his x mark. [L. S.]

S"h"-cheh-oos, or General Washington, Sub-chief of Lummi tribe, his x mark. [L. S.]
Whai-lan-hu, or Davy Crockett, Sub-chief of Lummi tribe, his x mark. [L. S.]
She-ah-delt-hu, Sub-chief of Lummi tribe, his x mark. [L. S.]
Kwult-seh, Sub-chief of Lummi tribe, his x mark. [L. S.]
Kwull-et-hu, Lummi tribe, his x mark. [L. S.]
Kleh-kent-soot, Skagit tribe, his x mark. [L. S.]
Sohn-heh-ovs, Skagit tribe, his x mark. [L. S.]
S"deh-ap-kan, or General Warren, Skagit tribe, his x mark. [L. S.]
Chul-whil-tan, Sub-chief of Suquamish tribe, his x mark. [L. S.]
Ske-eh-tum, Skagit tribe, his x mark. [L. S.]
Patchkanam, or Dome, Skagit tribe, his x mark. [L. S.]
Sats-Kanam, Squin-ah-nush tribe, his x mark. [L. S.]
Sd-zo-mahtl, Kik-ial-lus band, his x mark. [L. S.]
Dahtl-de-min, Sub-chief of Sah-ku-meh-hu, his x mark. [L. S.]
Sd"zek-du-num, Me-sek-wi-guilse sub-chief, his x mark. [L. S.]
Now-a-chais, Sub-chief of Dwamish, his x mark. [L. S.]
Mis-lo-tche, or Wah-hehl-tchoo, Sub-chief of Suquamish, his x mark. [L. S.]
Sloo-noksh-tan, or Jim, Suquamish tribe, his x mark. [L. S.]

Moo-whah-lad-hu, or Jack, Suquamish tribe, his x mark. [L. S.]
Too-leh-plan, Suquamish tribe, his x mark. [L. S.]
Ha-seh-doo-an, or Keo-kuck, Dwamish tribe, his x mark. [L. S.]
Hoovilt-meh-tum, Sub-chief of Suquamish, his x mark. [L. S.]
We-ai-pah, Skaiwhamish tribe, his x mark. [L. S.]
S"ah-an-hu, or Hallam, Snohomish tribe, his x mark. [L. S.]
She-hope, or General Pierce, Skagit tribe, his x mark. [L. S.]
Hwn-lah-lakq, or Thomas Jefferson, Lummi tribe, his x mark. [L. S.]
Cht-simpt, Lummi tribe, his x mark. [L. S.]
Tse-sum-ten, Lummi tribe, his x mark. [L. S.]
Klt-hahl-ten, Lummi tribe, his x mark. [L. S.]
Kut-ta-kanam, or John, Lummi tribe, his x mark. [L. S.]
Ch-lah-ben, Noo-qua-cha-mish band, his x mark. [L. S.]
Noo-heh-oos, Snoqualmoo tribe, his x mark. [L. S.]
Hweh-uk, Snoqualmoo tribe, his x mark. [L. S.]
Peh-nus, Skai-whamish tribe, his x mark. [L. S.]
Yim-ka-dam, Sr oqualmoo tribe, his x mark. [L. S.]
Twooi-as-kut, Skaiwhamish tribe, his x mark. [L. S.]
Luch-al-kanam, Snoqualmoo tribe, his x mark. [L. S.]
S"hoot-kanam, Snoqualmoo tribe, his x mark. [L. S.]
Sme-a-kanam, Snoqualmoo tribe, his x mark. [L. S.]
Sad-zis-keh, Snoqualmoo, his x mark. [L. S.]
Heh-mahl, Skaiwhamish band, his x mark. [L. S.]
Charley, Skagit tribe, his x mark. [L. S.]
Sampson, Skagit tribe, his x mark. [L. S.]
John Taylor, Snohomish tribe, his x mark. [L. S.]

Hatch-kwentum, Skagit tribe, his x mark. [L. S.]
Yo-i-kum, Skagit tribe, his x mark. [L. S]
T"kwa-ma-han, Skagit tribe, his x mark. [L. S.]
Sto-dum-kan, Swinamish band, his x mark. [L. S.]
Be-lole, Swinamish band, his x mark. [L. S.]
D"zo-lole-gwam-hu, Skagit tribe, his x mark. [L. S.]
Steh-shail, William, Skaiwhamish band, his x mark. [L. S.]
Kel-kahl-tsoot, Swinamish tribe, his x mark. [L. S.]
Pat-sen, Skagit tribe, his x mark. [L. S.]
Pat-teh-us, Noo-wha-ah sub-chief, his x mark. [L. S.]
S"hoolk-ka-nam, Lummi sub-chief, his x mark. [L. S.]
Ch-lok-suts, Lummi sub-chief, his x mark. [L. S.]

Executed in the presence of us –
M. T. Simmons, Indian agent.
C. H. Mason, Secretary of Washington Territory.
Benj. F. Shaw, Interpreter.
Chas. M. Hitchcock.
H. A. Goldsborough.
George Gibbs.
John H. Scranton.
Henry D. Cock.
S. S. Ford, jr.
Orrington Cushman.
Ellis Barnes.
R. S. Bailey.
S. M. Collins.
Lafayetee Balch.
E. S. Fowler.
J. H. Hall.
Rob''t Davis.

Executive Order

Lummi Reserve.

[In Tulalip Agency; occupied by Dwamish, Etakmur, Lummi, Snohomish, Sukwamish, and Swiwamish; treaty of January 22, 1855.]

EXECUTIVE MANSION, *November 22, 1873.*

It is hereby ordered that the following tract of country in Washington Territory be withdrawn from sale and set apart for the use and occupation of the Dwamish and other allied tribes of Indians, viz: Commencing at the eastern mouth of Lummi River; thence up said river to the point where it is intersected by the line between sections 7 and 8 of township 38 north, range 2 east of the Willamette meridian; thence due north on said section line to the township line between townships 38 and 39; thence west along said township line to the low-water mark on the shore of the Gulf of Georgia; then southerly and easterly along the said shore, with the meanders thereof, across the western mouth of Lummi River, and around Point Francis; thence northeasterly to the place of beginning; so much thereof as lies south of the west fork of the Lummi River being a part of the island already set apart by the second article of the treaty with the Dwamish and other allied tribes of Indians, made and concluded January 22, 1857. (Stats. at Large, vol. 12, p. 928.)

U. S. GRANT.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, KEITH E. MILNER and SHIRLEY A. MILNER, et. al, Defendants, THE LUMMI NATION, Intervenor-Plaintiff.	NO. CO1-0809R **DECLARATION OF DANIEL L. BOXBERGER**

I, Daniel L Boxberger, certify under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

1. I am over the age of 18 and competent to be a witness herein. I make this declaration concerning facts and events of my own personal knowledge.

2. I am a Professor of Anthropology at Western Washington University, and Chair of the Department of Anthropology at W.W.U. Attached hereto and incorporated herein as Attachment A is a true copy of my curriculum vitae.

3. I was hired by the Lummi Nation to investigate certain matters relating to this case. I have prepared a report which I understand has been furnished to the Defendants, and I have been deposed regarding that report.

4. As part of my research for this case, I obtained the entire file of the case, ***United States v. Stotts*** found in the National Archives and Records Administration, Pacific Northwest Region, located at Sand Point in Seattle, Washington. Attached hereto and incorporated herein as Attachment B is a true and correct copy of the records of that case that I located.

Signed and dated at Bellingham, Washington, on November 13, 2002.

/s/ Daniel L. Boxberger
Daniel L. Boxberger

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LESLIE RAY STOTTS, R. F. BARNARD, P. F. NORMAN, H. W. DAWLEY, and all persons claiming an interest in the property herein described, Defendants.	No. 624-E IN EQUITY AMENDED BILL OF COMPLAINT

TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON:

Comes now the United States of America, by Anthony Savage, United States Attorney for the Western District of Washington, and David Spaulding, Assistant United States Attorney for said District, and presents this, its Bill in Equity, against the defendants above named, and in that behalf plaintiff complains and alleges as follows:

I.

The defendants, LESLIE RAY STOTTS, R. F. BARNARD, P. F. NORMAN, and H. W. DAWLEY,

have or claim an interest in the real property hereinafter described.

II.

The plaintiff in the year 1855, and for a long time prior thereto was seized and possessed of certain real property situated at, in and around what is known as the Gulf of Georgia, in what is now the Northern Division of the Western District of Washington, in Whatcom County, which said lands were then and for a long time prior thereto had been a part of the public domain of the United States.

On January 22, 1855, the plaintiff, acting by and through Isaac I. Stevens, Governor and Superintendent of Indian affairs, for the Washington Territory, entered into a treaty at Point Elliott, Puget Sound, with the chiefs, head-men and delegates of Dwamish, Suquamish and other allied tribes in said Washington Territory, which said treaty was reduced to writing; whereby in Article 2 thereof, said tracts of land should be set apart and as for as necessary surveyed and marked out for the exclusive use of said Indians. Thereafter for the purpose of defining and establishing the boundaries of the Indian reservation created by said treaty, the plaintiff, by President U. S. Grant, made its proclamation establishing said Lummi Indian Reservation pursuant to the terms of said treaty, to-wit:

"EXECUTIVE MANSION,
November 2, 1875.

"It is hereby ordered that the following tract of country in Washington Territory be withdrawn from sale and set apart for the use and occupation of the Dwamish and other allied tribes of Indians, viz: Commencing at the eastern mouth of Lummi River; thence up said river to the point where it is intersected by the line between sections 7 and 8 of township 38 north, range 8 east of the Williamette meridian; thence due/north on said section line to the township line between townships 38 and 39; thence west along said township line to the lowwater mark on the shore of the Gulf of Georgia; then southerly and easterly along the said shore, with the meanders thereof, across the western mouth of Lummi River, and around Point Francis; thence northeasterly to the place of beginning; so much thereof as lies south of the west fork of the Lummi River being a part of the island already set apart by the second article of the treaty with the Dwamish and other allied tribes of Indians, made and concluded January 22, 1857. (Stats. at Large, vol. 12, p. 928.)

U. S. Grant."

III.

That pursuant to the terms of said treaty and the Presidential Proclamation, and at all times thereafter

to the date of this complaint, the plaintiff has devoted the said lands and real property contained within the exterior boundaries of said Lummi Reservation to the exclusive use and occupation of the Lummi and other allied tribes entitled to occupy the same under the said treaty, and the said real property described within the said exterior boundaries of said reservation is and at all times mentioned in this complaint was an Indian Reservation and a part of the public domain of the United States, the title to which has ever been held in fee simple by the plaintiff for the use and benefit of said Indians, except as allotments have been made from time to time to individual Indians.

IV.

That on the 26th day of January, 1925, the State of Washington sold and conveyed the tide lands located in front of Lot 1, Section 5, Township 38 N., Range 1 E., to R. F. BARNARD: on January 26, 1925, the State of Washington sold and conveyed the tide lands in front of Lot 2, Section 5, Township 38 N., Range 1 E., to B. F. NORMAN; that on January 26, 1925, the State of Washington sold and conveyed the tide lands in front of Lots 3, 4, 5 and 6, Section 5, Township 38 N., Range 1 E., to LESLIE RAY STOTTS; that on January 26, 1925, the State of Washington sold and conveyed to LESLIE RAY STOTTS tide land in front of that part of Lot 1, Section 5, Township 38 N., Range 1 E., located south of the plat of Neptune Beach; that on January 27,

1925, the State of Washington sold and conveyed to H. W. DAWLEY, lands in front of the south 150 feet of Lot 2 of said Section 5, Township 38 N., Range 1 E.

V.

That all and singular the above described parcels of land lie within the exterior boundaries of the Lummi Indian Reservation as the same was established, defined and bounded by the said treaty and presidential proclamation, within the said division and district aforesaid, and are a part of the public domain of the United States.

VI.

That the said several deeds and contract, purporting and attempting to convey title to the defendants hereinafter mentioned to the lands mentioned and described therein cloud, encumber and injure the plaintiff's title and serve to continually and constantly annoy, harass and disturb the plaintiff in the quiet and peaceful enjoyment of said lands which it had set aside for the use and benefit of said Indians. That from time to time trespasses have been committed on said lands by the white defendants named herein, and others to the plaintiff unknown, and the outstanding purported, pretended and alleged title from the State of Washington operates as and furnishes an alleged and pretended justification to said defendants and others to continue to trespass on said lands and on said Indian Reservation.

VII.

That all, and singular, the purported, attempted and pretended conveyances of the State of Washington to said mentioned defendants, attempting and purporting to convey the said tide lands herein described are and were null and void and the State of Washington was without legal authority to enter into or make or execute the said conveyances or to sell or dispose of the said lands, and the said mentioned defendants, LESLIE RAY STOTTS, R. F. BARNARD, P. F. NORMAN, H. W. DAWLEY, acquired no legal or lawful right, title, interest or estate in or to said lands, and their said pretended and alleged claims of ownership and title constitute a cloud on plaintiff's title.

VIII.

That all and singular the lands described herein are vacant and unoccupied tide lands in the Gulf of Georgia, in the possession of the plaintiff and all within the boundaries of said Lummi Reservation.

That the uplands adjacent to the above described waterfront property has been heretofore alienated by the Indians and is at present owned in fee simple by citizens.

IX.

The plaintiff has no adequate remedy at law whereby its title to said Reservation may be quieted

and relieved of the pretended claims of the defendants and the several deeds and contract described herein canceled, set aside and decreed to be null and void; that the lands described in this complaint, title to which the plaintiff seeks to quiet and to remove encumbrances therefrom lie and are situated in Whatcom County, within the Northern Division of the Western District of the state of Washington and within the jurisdiction of this court. [This action is brought by the direction of the attorney general of the United States and by virtue of the authority received by the US atty for the western district of Washington from said attorney general. /s/ [Illegible] [illegible]]

PRAYER

IN CONSIDERATION WHEREOF and for inasmuch as the plaintiff is without full and adequate remedy in the premises, save in a court of equity, and to the end that the defendants, and each of them, may full, true and direct answer make to all and singular the matters and things herein set out, and may fully disclose and state their claims to the said land, and whatever right, title or interest they may have in and to the said lands described in this complaint, or to any part thereof, as fully as if they had been particularly interrogated thereunto, but not under oath (an answer under oath being hereby expressly waived), plaintiff now prays the Court that all and singular the several conveyances, deeds and other instruments purporting on their face to convey an interest in and to the lands described herein, to

the several defendants mentioned in this cause, be decreed to be null and void and of no legal effect, and that the said deeds, instruments and other conveyances purporting to convey or establish an interest in and to the above described lands be canceled, set aside and decreed to be null and void, and the several alleged owners of said lands named as defendants in this action be decreed to have no estate, right, title or interest in said lands.

Plaintiff further prays that its title be quieted as against the claims of each and every of the defendants named herein and all and singular as against the claims and demands of any person or persons whomsoever having or claiming to have an interest in and to said lands, and the plaintiff be decreed to be the owner of said lands as against all the world, subject to such right, title or interest as the plaintiff has created or has conveyed. And that plaintiff have such other and further relief as in equity may seem meet.

May it please Your Honor to grant unto the plaintiff a writ of subpoena of the United States of America, issued by and under the seal of this Honorable Court, directed to the defendants, and each of them, thereby commanding them, and each of them, at a certain time and under a certain penalty therein to be limited, to appear before this Honorable Court and then and there full, true and direct answers make to all and singular the premises, and stand to perform and abide by said order, direction and decree as may be made against them, or any of

them, in the premises as shall be meet and agreeable in equity.

/s/ Anthony Savage
United States Attorney

/s/ David Spaulding
Assistant United
States Attorney

UNITED STATES OF AMERICA)
WESTERN DISTRICT OF WASHINGTON) ss
NORTHERN DIVISION)

DAVID SPAULDING, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, Northern Division, and as such makes this verification for and on behalf of the United States of America;

That he has read the foregoing [Amended]/Bill of Complaint, knows the contents thereof, and believes the same to be true.

/s/ David Spaulding

SUBSCRIBED and sworn to before me this 27th day of June, 1928.

/s/ [Illegible]
Deputy Clerk, United States
District Court, Western
District of Washington

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, KEITH E. MILNER and SHIRLEY A. MILNER, et. al, Defendants, THE LUMMI NATION, Intervenor-Plaintiff.	NO. CO1-0809R **DECLARATION OF RICHARD JEFFERSON**

I, Richard Jefferson, certify under penalty of perjury under the laws of the United States that the following statements are true and correct to the best of my knowledge:

1. I am an enrolled member of the Lummi Nation, and Director of the Planning Department for the Lummi Nation, Intervenor-Plaintiff in the above titled case. I am also a former member of the Lummi Indian Business Council, the governing body of the Lummi Nation. I am over the age of 18 and competent to be a witness herein. I make this declaration concerning facts and events of my own personal knowledge.

2. When Sandy Point was first developed, the Lummi Tribe entered into a lease with the Sandy Point Improvement Company, for the benefit of the waterfront owners at Sandy Point. A true and correct copy of that lease is attached as Exhibit 1. The lease gave the Sandy Point waterfront owners the right to place bulkheads, seawalls, rip-rap and other shore defense structures on the tidelands owned by the United States in trust for the Lummi Tribe. See lease paragraph 16.

3. The lease expired in 1988. The lessee held an option to renew the lease for an additional 25 years. See lease paragraph 14. After the Lummi Nation was informed that the Sandy Point Improvement Company was not intending to exercise its option to renew the lease and was also refusing to remove the shore defense structures from the tidelands, I became personally involved as a member of the Lummi Indian Business Council in the Tribe's extended efforts to negotiate a new lease with the Sandy Point waterfront property owners. I participated later as the Director of the Planning Department as well. The Tribe hoped to avoid the need to sue its neighbors to remove the trespassing structures.

4. The negotiations lasted longer than in the usual commercial or residential lease, for a number of reasons: (1) the sheer number of parties and attorneys involved in the negotiations, (2) tense relations between the Tribe and some of the Sandy Point owners, (3) the complexity of the legal issues surrounding ownership of the tidelands, and (4) the

harm that might accrue to the Sandy Point waterfront owners if the bulkheads were summarily removed. In addition, the very complicated question of a lease for the entrance to the artificial canal system at Sandy Point was being addressed by the negotiators at the same time. The Lummis tried to be patient, in the hopes that the Sandy Point owners would realize that it was in their best interests to negotiate rather than defend a lawsuit.

5. At all times during the negotiations, we made it clear that the Tribe was not simply going to go away, that the waterfront owners had to either agree to a lease, remove the bulkheads, or face a trespass lawsuit.

6. Despite our best efforts, we were not able to reach a negotiated solution with Defendants. It became clear to all concerned that until certain legal issues were resolved, the parties were not likely to reach an agreement on new lease terms. At that point the United States filed this lawsuit.

DATED this 14th day of November, 2002, at Bellingham, Washington.

/s/ Richard Jefferson
Richard Jefferson

U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

LEASE

Fee: $6.00 Allotment No. Lummi Tribal Tidelands
Lease No. 4577
Contract No. _____

Western Washington Indian Agency

THIS CONTRACT, made and entered into this 14th day of May, A.D. 1965, by and between the Indian or Indians named below (the Secretary of the Interior acting for and on behalf of the Indians) hereinafter called the "lessor," and Sandy Point ~~Community Co., Inc.~~ Improvement Co., FLK, a Washington corporation, of 518 – 1st Avenue North, Room 26, Seattle, Washington 98109, hereinafter called the "lessee" in accordance with the provisions of existing law and the regulations (25 CFR 131) which by reference are made a part hereof.

WITNESSETH, That for and in consideration of the rents, covenants, and agreements hereinafter provided, the lessor hereby lets and leases unto the lessee the land and premises described as follows, to wit: See attached "Exhibit A"

containing 3-400 acres, more or less, for the term to expire on March 31, 1988, subject to Provision 1, to be used only for the following purposes: resort,

recreational, boating, fishing and related moorage, and all aspects of these uses.

The lessee, in consideration of the foregoing, covenants and agrees, as rental for the land and premises, to pay:

TO –	DATE DUE	AMOUNT
Bureau of Indian Affairs,	5-1-65	$ 2,000.00
Western Washington	5-1-66	2,000.00
Agency for the LUMMI	5-1-67	2,000.00
TRIBE OF INDIANS	5-1-68	2,000.00
	5-1-69	2,000.00
	See Provision 7	

In the event of the death of any of the owners to whom, under the terms of this lease, rentals are to be paid direct, all rentals remaining due and payable shall be paid to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises. This provision is applicable only while the leased premises are in trust or restricted status.

While the leased premises are in trust or restricted status, the Secretary may in his discretion, and upon notice to the lessee, suspend the direct rental payment provisions of this lease in which event the rentals shall be paid to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

This lease is subject to the following provisions:

1. "SECRETARY" as used herein means the Secretary of the Interior or his authorized representative.

2. IMPROVEMENTS. – Unless otherwise provided herein it is understood and agreed that any buildings or other improvements placed upon the said land by the lessee become the property of the lessor upon termination or expiration of this lease.

3. UNLAWFUL CONDUCT. – The lessee agrees that he will not use or cause to be used any part of said premises for any unlawful conduct or purpose.

4. SUBLEASES AND ASSIGNMENTS. – Unless otherwise provided herein, a sublease, assignment or amendment of this lease may be made only with the approval of the Secretary and the written consent of all parties to this lease, including the surety or sureties.

5. INTEREST. – It is understood and agreed between the parties hereto that, if any installment of rental is not paid within 30 days after becoming due, interest at the rate of 6 percent per annum will become due and payable from the date such rental became due and will run until said rental is paid.

6. RELINQUISHMENT OF SUPERVISION BY THE SECRETARY. – Nothing contained in this lease shall operate to delay or prevent a termination of Federal trust responsibilities with respect to the land by the issuance of a fee patent or otherwise during

the term of the lease; however, such termination shall not serve to abrogate the lease. The owners of the land and the lessee and his surety or sureties shall be notified by the Secretary of any such change in the status of the land.

7. RENTAL ADJUSTMENT. – The rental provisions in all leases which are granted for a term of more than five years and which are not based primarily on percentages of income produced by the land shall be subject to review and adjustment by the Secretary at not less than five-year intervals in accordance with the regulations in 25 CFR 131. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by this contract or the contribution value of such improvements.

8. INTEREST OF MEMBER OF CONGRESS. – No Member of, or Delegate to, Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this provision shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

9. VIOLATIONS OF LEASE. – It is understood and agreed that violations of this lease shall be acted upon in accordance with the regulations in 25 CFR 131.

10. ASSENT NOT WAIVER OF FUTURE BREACH OF COVENANTS. – No assent, express or implied, to any breach of any of the lessee's covenants,

shall be deemed to be a waiver of any succeeding breach of any covenants.

11. UPON WHOM BINDING. – It is understood and agreed that the covenants and agreements hereinbefore mentioned shall extend to and be binding upon the heirs, assigns, successors, executors, and administrators of the parties of this lease. While the leased premises are in trust or restricted status, all of the lessee's obligations under this lease, and the obligations of its sureties, are to the United States as well as to the owner of the land.

12. APPROVAL. – It is further understood and agreed between the parties hereto that this lease shall be valid and *binding only* after approval by the Secretary.

13. ADDITIONS. – Prior to execution of this lease, provision(s) number(s) 14, 15, 16, 17 and 18 ~~has~~ (have) been added hereto and reference ~~is~~ (are) made a part hereof.

14. This lease may be renewed at the option of the Lessee for a further term of not to exceed twenty-five (25) years, commencing at the expiration of the original term, upon the same conditions and terms as in effect at the expiration of the original term, provided that notice of the exercise of such option shall be given by the Lessee to the Lessor and the Superintendent in writing at least twelve (12) months prior to said expiration of original term.

15. The purpose of this lease is for boating, fishing and recreational, and moorage, repair and all uses related to these purposes. The Lummi Indian Tribe reserves access rights over said tidelands.

16. It is understood that the Lessee has the right to alter or fill portions of the tidelands not to exceed 100 feet seawardly from the present bank.

17. It is understood and agreed that this lease is subject to Lease No. 4154, in favor of the Bellingham Marine, Inc. covering a 200-foot passageway.

18. No payments made under this lease will be refunded because of title defects and the Lessor and the Secretary do not warrant title to the leased premises.

Sandy Point Community Co., Inc. Lease

Lummi tribal tidelands immediately adjacent to and fronting upon the following described lands in Whatcom County, State of Washington:

Government Lots 1, 2, 3, 4, sec. 8.

Government Lots 5 and 6, sec. 9.

Government Lots 1, sec. 17.

Government Lots 1, sec. 16.

All in T. 38 N., R. 1E., Willamette Meridian, Washington.

The tidelands described in this lease shall not exceed beyond 660 feet seawardly from the present bank.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands on 14th day of May, 1965.

Witnesses (two to each signature):

SANDY POINT ~~COMMUNITY CO., Inc.~~ IMPROVEMENT CO.

By /s/ R.E. Rogers
President

P.O. _____

Lessee

ATTEST: Robert R. Walker
Assistant Secretary
Sandy Point
Improvement Co.

P.O. _____

987399

Lessee

ATTEST: _____

LUMMI INDIAN TRIBE

P.O. Vernon Lane
~~Secretary~~, Lummi
Tribal Council
Acting Sec.

By /s/ Forrest L. Kinley

Lessor

_____

Lummi Tribal Council

P.O. _____

Lessor

STATE OF WASHINGTON)
: SS
COUNTY OF SNOHOMISH)

On this day personally appeared before me Forrest Kinley, Chairman of the Lummi Tribal Council, to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 14th day of May, 1965.

/s/ H.E. Isenhart
NOTARY PUBLIC in and for the State of Washington, residing at Everett

STATE OF WASHINGTON)
: SS
COUNTY OF [ILLEGIBLE])

On this day personally appeared before me R. E. Rogers and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

P.O. _____

GIVEN under my hand and official seal this 14th day of May, 1965.

/s/ H.E. Isenhart
NOTARY PUBLIC in and for the State of Washington, residing at Everett

Approved MAY 17 1965 /s/ George M. Felshaw
Superintendent

Approving Official.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, KEITH E MILNER and SHIRLEY A MILNER, et. al, Defendants, THE LUMMI NATION, Intervenor-Plaintiff	NO CO1-0809R **SECOND DECLARATION OF DANIEL L. BOXBERGER** **(Noted for hearing November 22, 2002)**

I, Daniel L Boxberger, certify under penalty of perjury under the laws of the State of Washington that the following statements are true and correct

1. I am over the age of 18 and competent to be a witness herein. I make this declaration concerning facts and events of my own personal knowledge

2 I am a Professor of Anthropology at Western Washington University, and Chair of the Department of Anthropology at W.W.U Attached hereto and incorporated herein as Attachment A is a true copy of my curriculum vitae.

3 I was hired by the Lummi Nation to investigate certain matters relating to this case. I have prepared a report which I understand has been

furnished to the Defendants, and I have been deposed regarding that report A copy of that report is appended and incorporated herein as Attachment B

4 As stated in my report, the Lummi Indians in the nineteenth century understood the demarcation between uplands and tidelands to be the line of vegetation. When the federal government had the Lummi Reservation surveyed in the 1870's and 1880's for the purpose of allotting the arable lands of the Reservation, the line of vegetation would have been understood by the Indians to be the boundary between the individually owned uplands and the tidelands that were to be held for the common use of all tribal members

Signed and dated at Bellingham, Washington, on November 15, 2002

/s/ Daniel L. Boxberger
Daniel L. Boxberger

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The Importance of Tidelands to the Lummi Indians

and

The Understanding of the Lummi Indians of the Surveys of Land Assignments and Tidelands on the Lummi Indian Reservation

Prepared for the Office of the Reservation Attorney
Lummi Indian Reservation

by

Daniel L. Boxberger, Ph.D.
Bellingham, Washington

February 2002

* * *

II. Question 1

1. What was the importance of tidelands to the Lummi Indians at and around the time of the Treaty of Point Elliott and at the time the assignment of lands were made on the Lummi Indian Reservation?

From time immemorial the Lummi have been a people of the seacoast. The dependence upon maritime resources has been indicative of the Lummi way of life from prehistoric times to the present. This dependence was recognized by the federal government of the United States. In Article 5 of the Treaty of Point Elliott the U.S. Government and the Lummi agreed that:

> The right of taking fish at all usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked and cultivated by citizens.

The dependence of the Lummi on the resources of the tidelands has been recorded in the ethnographic database, most notably by Stern (1934) and Suttles (1951). They both emphasize the importance of the shoreline to the Lummi. The shore is the area between the sea and the land. Symbolically the shore

is the mid-point in the life of a person. The preferred place for a child to be born was on the beach. When a person dies they are laid to rest in the forest. The shore is where people pull up their canoes and where they build their homes. Homes were built above the high water mark on sand or gravel where support posts could be dug into the ground, where there was drainage and where they were protected from the cold northeast wind. Summer homes were built on rocky shores facing the sun, preferably where the warm wind blows so that it will help dry the fish taken at reef net locations. Several homes composed a village. Canoes were usually left just above the high water mark so that they could easily be launched when needed.

In front of the villages were sandy or gravel beaches and often below the beaches were mud flats uncovered at low tide. In the gravel there were butter clams, steamer clams, and horse clams. On the mud flats cockles lie just below the surface and beds of mussels are found. Further out on the tide flats are beds of eelgrass where flounders can be speared when the tide is low. Herring lay their eggs on the eelgrass and the Lummi would gather the herring spawn for food. Crabs could be taken at low tide by wading. At the upper end of the beach the Lummi would dig pits to steam shellfish. First a fire would be built, then seaweed laid over the hot rocks, then shellfish, then more seaweed, and then covered over and allowed to cook. This was an important method for cooking large amounts of shellfish for preservation as well as the

center of important social events. Ducks swim over the beds of eelgrass and into the deeper water. Eelgrass is used for tying on the reef nets. In some places a path could be cut through the eelgrass to guide the salmon into the nets. Beyond the low tide was where the reef nets were set. Reef nets took sockeye salmon, the mainstay of the Lummi economy (Boxberger 2000:13).

On rocky shores other types of resources were found in the intertidal zone. Sea urchins, abalone and oysters were gathered from these locations. Beyond low tide rock fish and ling cod could be lured to the surface to be speared, or taken with a hook and line.

Above the beach, beyond the reach of the tide, camas, wild onions and other plant foods grow. By the early 1800s the Lummi were planting potatoes in the beach prairies, an indication that agriculture was a well understood concept by the time the treaties were negotiated. It is also an indication that the Lummi valued agriculture as an addition to their standard of living by treaty time. In some places there are salt marshes where cattail and tule are harvested to make into mats for bedding and floor coverings. Beyond the beach prairies and salt marshes lie the forest where red cedar provided planks for their homes, logs for canoes, and cedar bark for clothing and baskets.

Exclusive or primary "ownership" of certain sites existed, but it was not the formal or typical way in which resources were accessed or exploited. Some

locations, such as reef net sites, were said to be owned by individuals. However, the owner was expected to hold the site in trust for a larger kin group. Thus, the Lummi understood the concept of ownership of particular properties, but mostly the ownership of resource locations was impractical and uncommon. There is a singular instance of a clam bed on Lopez Island being in the control of an extended kin group, but in almost all cases the tidelands were used in common by the Lummi tribe.

Based on these facts, it is likely that the concepts of family ownership of upland tracts and common ownership of the beaches and tidelands could have been conveyed to and understood by the Lummi during the treaty-making process. Just as the Lummis were adamant about maintaining their historic access to off reservation fisheries in the treaty negotiations, it is likely that they would also have been adamant about preserving the common use of the reservation tidelands. This is especially likely given the role of the beaches in the daily lives of every 19th century Lummi, and the fact that many of the treaty assignments would inevitably be located away from the beach. It is difficult to conceive of treaty time Lummis agreeing to forego access to and use of the beaches, or to make their access and use dependent upon permission from other persons, even other members of the tribe.

The culture of the Lummi can be seen as centered on the beach where every part of their livelihood was found. The beach was part of a transition from the

sea to the forest. Like the life of an individual is a transition from infancy to old age, Nature is a transition from the sea to the land. Nature is a source of supernatural powers and food is a gift of the supernaturals. Nature is exploited by the intensive use of specific resources at specific times of the year. From the winter villages to shellfish gathering locations, to reef net sites, to root crops, the Lummi seasonally depended upon localized resources that were consumed fresh and preserved for use year-round. The beaches were the thoroughfare of access. Although, salmon played a major role in the subsistence economy of the Lummi, the importance of other resources cannot be dismissed. Shellfish especially were an important resource for the Lummi, as were other littoral resources. While modified by economic and political exigencies this dependence continues into the present.

Prior to 1860 the Lummi lived in about nineteen villages between Point Roberts and Lopez Island. Three of these villages were located on what was to become the Lummi Indian Reservation. By the Treaty of Point Elliott the Lummi agreed to move onto the reservation and establish their permanent homes there.

Indian reservations were intended to be a base from which the northwest Indians would continue to rely on the resources of their traditional territories. Recognizing that the Indians were dependent upon resources off the reservation and that they would not give up that dependence in the treaties, the federal government agreed that the Indians would be able to

leave the reservation for the purposes of fishing, hunting and gathering. This was made explicit at the treaty negotiations. The reservation was to be the place where the Lummi built their homes, but the Lummi also expected to be able to travel off-reservation to access other resource sites. Article 5 of the Treaty of Point Elliott (quoted above) stipulates the right to erect shelters off-reservation to preserve resources. This would have typically been on the beach.

The Lummi Reservation was ideally located for these purposes. It provided access to the fishing locations of the San Juan archipelago and northward to Point Roberts. It is located at the mouth of the Nooksack River, an important salmon stream. And it was composed mostly of low bank shoreline which provided building locations and access to the sea shore.

The sea shore of the Lummi Indian Reservation is essential for four main reasons: it provides access to the main means of water transportation; it provides means of access to salmon fisheries; it provides access to intertidal resources; and it is a place of gathering for social activities.

Intertidal resources are gathered in a number of locations on the reservation. Shellfish, in particular, are harvested at Brant Island in Lummi Bay, near Portage, Gooseberry Point and Sandy Point. Sandy Point was a place where Lummis gathered butter clams (*Saxidomus giganteus*). Aloysius Charles

(1898-1983) a respected tribal historian, spoke of the importance of Sandy Point during spring tides. He told of how sometimes in the spring when the *stee-whit* (west wind) blew, it would create strong wave action on Sandy Point. This wave action would wash the butter clams loose and the Lummi could gather them in abundance, preserving large numbers.

In summary, the reservation tidelands were of vital importance to the welfare of the Lummi tribe as a whole at treaty time. The tidelands provided access to resources both within the tidelands and, via canoe, in other locations where the Lummi reserved fishing and gathering rights. The tidelands were socially, economically and culturally important to the manner in which the Lummi viewed themselves and the world around them. They would not have relinquished the common use of the reservation tidelands to individuals or families when they entered into the treaty.

* * *

Judge Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. KEITH E MILNER AND SHIRLEY A MILNER, Defendants.	NO. C01-0809R DECLARATION OF JAMES JOHANNESSEN
UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. MARY D. SHARP, Defendant.	
UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. BRENT C. NICHOLSON AND MARY K. NICHOLSON, Defendants.	

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation,
Plaintiff,
v.
HARRY F. CASE,
Defendant.

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation,
Plaintiff,
v.
IAN C. BENNETT AND MARCIA A. BOYD,
Defendants.

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation,
Plaintiff,
v.
DONALD C. WALKER AND GLORIA WALKER,
Defendants.

THE LUMMI NATION,
Intervenor-Plaintiff.

DECLARATION OF JAMES JOHANNESSEN

I, JAMES JOHANNESSEN, do declare and say:

1. I am a coastal geomorphologist specializing in applied coastal research and science-based coastal management. I have been employed as a coastal geomorphologist since 1985. A true and correct copy of my curriculum vitate is attached hereto and marked as Exhibit A, which further summarizes my experience.

2. I have been asked by the Assistant United States Attorney who represents the federal government in this case to prepare a declaration which discusses the environmental impacts of the riprap and bulkhead which fronts the property of Brent and Mary Nicholson.

3. The riprap fronting the bulkhead at the Brent and Mary Nicholson property, located on the southern portion of the west shore of Sandy Point on the Lummi Indian reservation, is negatively impacting the Lummi owned tidelands in terms of beach stability and nearshore habitats. The large volume of riprap that is present at the property extends down to the mid to lower foreshore (steeper upper and mid portions of the intertidal beach), with large boulders on the beach scattered between +2.5 and +6.0 ft Mean Lower Low Water (MLLW).

4. The presence of bulkheads has been documented to accelerate beach erosion as beach sediment directly waterward of this type of structure is

entrained by increased reflectivity and increased hydraulic turbulence (Macdonald at al., 1994, Miles et al., 2001). A bulkhead with reflective character acts to reflect incoming wave energy back out across the beach (Plant and Griggs 1992). Much of the energy of incoming waves is transferred back waterward (as rapid backwash), which transports the mobilized beach sediment offshore into bars or alongshore at an accelerated transport rate (Miles et al 1997). The effect of bulkheads should be contrasted against a dissipative sand and gravel backshore/"storm berm."

5. Beaches waterward of an intertidal bulkhead/ revetment also tend to experience a higher degree of bulkhead-induced impacts than do beaches waterward of a bulkhead that is located landward of Mean Higher High Water (MHHW) (Canning and Shipman 1995, Shipman 1998, Spalding et al 2001, Nordstrom 1992). The toe of the dense riprap revetment at the Nicholson property, as surveyed in May 2004 by Pacific Survey and Engineering, extends waterward to approximately elevations +5.5 to +6.25 ft MLLW. This is generally 2.0 to 2.5 ft vertically below local MHHW (+8.32 ft MLLW). Virtually the entire rock revetment is located waterward of Mean High Water (MHW) and MHHW. The dense riprap revetment is stacked at a very steep angle at the Nicholson property, and the boulders are very angular, such that the riprap has a moderately reflective waterward face. Wave reflection at the property has very likely removed beach sediment from the foreshore, leading to a lower beach profile that would be present without the riprap at

the Nicholson property. Bulkhead induced turbulence appears to have caused the foreshore to be artificially steep fronting the Nicholson property, creating an artificially narrow foreshore.

6. The presence of a bulkhead or steep riprap revetment on the upper intertidal tends to cause a selective winnowing of beach sediment, with fines (sand) selectively removed from the foreshore waterward of the bulkhead (Thom et al 1994). This is due to increased wave energy immediately waterward of the bulkhead as well as increased littoral drift (longshore transport) rates (Miles 2001). Fine sediment is removed from the area waterward of the bulkhead and deposited further waterward or transported away from the site.

7. When fines are removed from the upper intertidal beach due to bulkhead-induced impacts, the beach is converted to a gravel beach, as is likely the case at southern Sandy Point (MacDonald et al 1994). A gravel beach does not provide the same quality of habitat as a finer grain beach (Thom et al 1994). This leads to a direct loss of nearshore habitats due to reduction in area of habitat patches. Habitats of particular value to the local nearshore system that may have been present at the subject property include forage fish (such as surf smelt) spawning habitat. These habitat areas are only found in the upper intertidal portion of fine gravel and sand beaches, with a high percentage of 1-7 mm sediment (Pentilla 1978). Beach sediment coarsening also can affect hardshell clam habitat, by decreasing or locally

eliminating habitat. This may very well have occurred at the Nicholson property, but no accurate pre-development data is known to exist.

8. In general terms, when erosion occurs at a bulkheaded site for whatever reason, the intertidal area is decreased (Shipman 1998, Douglass and Pickel 1999) and intertidal habitat area is lost. This is the case at the Nicholson property where the beach above the +3 ft MLLW contour is partially covered by large boulders and the beach above the +5.5 to +6.25 ft MLWW contour is completely covered with large boulders. For comparison, the unbulkheaded shore that is nearest to the Nicholson site, located approximately 27 lots to the north, the beach and backshore area extended (as surveyed in January 2002 by Pacific Surveying and Engineering) approximately 73 ft landward of the elevation corresponding to the bulkhead toe at Nicholson property (+6.0 ft MLLW).

9. Studies in other locations have quantitatively documented a decrease in meiofaunal abundance in upper beach sediment waterward of a bulkhead (Spalding and Jackson 2001). This may also be the case at the Lummi tidelands waterward of the Nicholson property.

10. In conclusion, the large riprap revetment at the Nicholson property discussed herein, impart negative physical and ecological impacts to the nearshore system habitats it contains.

11. A list of references which I have relied on in support of the foregoing is as follows:

Canning, Douglas J. and Hugh Shipman, 1994, Coastal Erosion Management Studies in Puget Sound, Washington: Executive Summary, *Coastal Erosion Management Studies Volume I*, Shorelands and Water Resources Program, Washington Department of Ecology, Olympia.

Douglass, Scott, and Pickel, Bradley, 1999, The Tide Doesn't Go Out Anymore – The Effects Of Bulkheads On Urban Bay Shorelines, *Shore and Beach*, v. 67, n. 2&3, p. 19-25.

Macdonald, Keith, Simpson, David, Paulsen, Bradley, Cox, Jack, and Gendron, Jane, 1994, *Shoreline armoring effects on physical coastal processes in Puget Sound, Washington*: Coastal Erosion Management Studies, Volume 5, Shorelands Program, Washington Dept. of Ecology, Olympia, DOE Report 94-78.

Miles, J.R., Russel, P.E., and Huntley, D.A., 1997, Sediment transport and wave reflection near a seawall. *Proceedings of the 25th Coastal Engineering Conference*. (American Society of Civil Engineers) p. 2612-2624.

Miles, Jonathan R., Paul E. Russel, and David A. Huntley, 2001, Field Measurements of Sediment Dynamics in Front of a Seawall, *Journal of Coastal Research*, v. 17, n. 1, p. 195-206.

Nordstrom, K.F., 1992, *Estuarine Beaches*, New York: Elsevier, 225p.

Pentilla, Dan, 1978, Studies of Surf Smelt (Hypomesus pretiosus) in Puget Sound. WA Dept. of Fisheries, Technical Report No. 42, 47 p.

Plant, N.G. and Griggs, G.B., 1992, Interactions between nearshore processes and beach morphology near a seawall. *Journal of Coastal Research*. 8, 183-200.

Shipman, Hugh, 1998, *Shoreline change at North Beach, Samish Island*, Shorelands and Environmental Assistance Program, WA Dept. of Ecology, Pub. No. 98-101, Olympia, 44p.

Spalding, V.I., and Nancy L. Jackson, 2001, Field Investigation of the Influence of bulkheads on Meiofaunal Abundance in the Foreshore of an Estuarine Sand Beach, *Journal of Coastal Research*, v. 17, no. 2, p. 363-370.

Thom, R.M., Shreffler, D.K., and MacDonald, K., 1994, Shoreline Armoring Effects on Coastal Ecology and Biological Resources in Puget Sound, Washington, *Coastal Erosion management Studies*, v. 7, Report 94-80, Shorelands and Coastal Management Program, Washington.

I declare under penalty of perjury that the foregoing is true and correct.

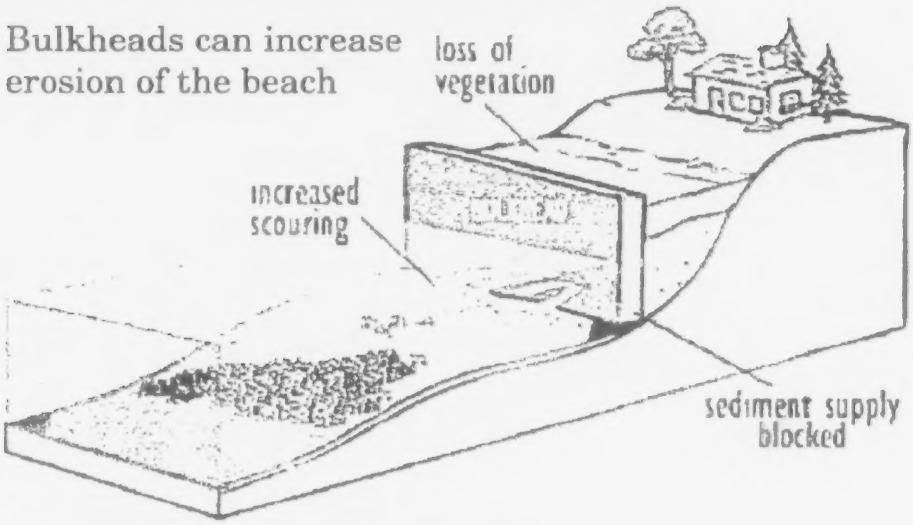
Executed this [illegible] day of [illegible], 2004 at Bellingham, Washington.

/s/ [illegible]
JAMES JOHANNESSEN

Department of Ecology

Puget Sound Shorelines

Bulkheads Can Change The Beach



☐ **Increased Beach Erosion**

When waves reflect off shoreline armoring structures, particularly concrete bulkheads, they can scour away sediments and increase erosion.

☐ **Loss of Sand**

In time, a sandy beach can be transformed into gravel or cobbles – and may even be scoured down to bedrock, or more commonly in Puget Sound, a hard clay. The footings of bulkheads may also be exposed, leading to undermining and failure.

☐ **Loss of Surrounding Beaches**

Where long stretches of shore are lined with bulkheads and other hard armoring, beaches composed of fine sediments can erode down to gravel, cobble, or hardpan within a few decades.

☐ **Loss of Sediment**

Bulkheads can shut off the supply of sand and gravel to the beach, resulting in beach loss and the gradual loss of finer sediment.

☐ **Loss of Plants**

When bulkheads are built, overhanging trees and shrubs are often removed. This can cause increased siltation, reduced organic matter, and changes in nearshore marine habitat.

☐ **Loss of Shade**

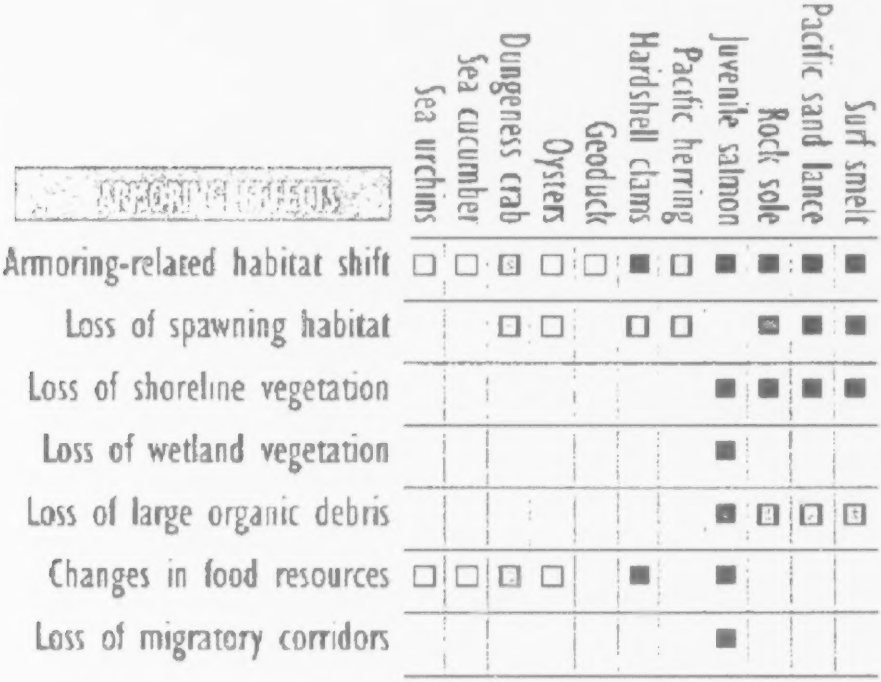
The loss of bank vegetation reduces shade and shelter on the upper beach. As a result, spawning habitat for forage fish (such as surf smelt) may be degraded.

☐ **Loss of Habitat**

Bulkheads and other armoring devices can degrade the nearshore habitats that provide food for many benthic feeding fish, including salmon. In addition, spawning areas for surf smelt, sand lance, and herring may be lost due to removal of fine sediments from the intertidal zone.

Armoring Effects on Species

Bulkheads and other armoring devices can change important shoreline habitats. Shoreline areas used by fish, shellfish, birds, marine mammals, and other marine life may be damaged.



KEY

■ Well documented evidence of negative effects.

▨ High potential for negative effects but not documented.

□ Some potential for long term effects but not documented.

Source: Shoreline Armoring Effects on Coastal Ecology and Biological Resources in Puget Sound

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Washington Coastal Erosion Management Studies, Volume 7. Washington State Department of Ecology August 1994